

**JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS**

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Report

TO: Members of the Judicial Council

FROM: Civil and Small Claims Advisory Committee
Hon. Douglas Miller, Chair
Heather Anderson, ADR Subcommittee Counsel, 415-865-7691
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DATE: October 16, 2002

SUBJECT: Alternative Dispute Resolution: Mediator's Statement to Court
Concerning Mediation Agreement or Nonagreement (revise form
ADR-100) (Action Required)

Issue Statement

Judicial Council form ADR-100, *Statement of Agreement or Nonagreement*, must be used by mediators in two court-connected mediation programs established by statute: the Civil Action Mediation Program¹ and the Early Mediation Pilot Programs,² to inform the court whether agreement was reached when a mediation ends. Currently, form ADR-100 does not provide mediators with a clear way of informing the court: (1) that a mediation did not take place; (2) that a mediation is not completed; or (3) whether the form is the first or a supplemental ADR-100 filed in the case.

Recommendation

The Civil and Small Claims Advisory Committee recommends that the Judicial Council, effective January 1, 2003, revise form ADR-100 to provide mediators with ways of informing the court:

1. That a mediation did not take place and, without violating confidentiality, why it did not take place;
2. That a mediation is not completed;
3. Whether the form is the first or a supplemental ADR-100 filed in the case; and
4. That a partial resolution was reached in mediation.

¹ Code Civ. Proc., § 1775 et seq.

² Code Civ. Proc., § 1730 et seq.

Rationale for Recommendation

Both Code of Civil Procedure section 1739, applicable to the Early Mediation Pilot Program and section 1775.9, applicable to the Civil Action Mediation Programs, require that if one of the parties decides to end the mediation, the mediator must submit a “statement of nonagreement” in a form adopted by the Judicial Council. Form ADR-100 was developed in 1994 in response to this requirement. It currently provides spaces for mediators to indicate when they were assigned to mediate the case, when the mediation took place, how many hours of mediation took place, and whether the mediation ended in full agreement regarding some or all parties or ended in nonagreement.

Mediations that did not take place

Even where, as in the Early Mediation Pilot Programs or the Civil Action Mediation Program, a court can order a case to mediation, the mediation may never take place. For example, the parties may settle before the scheduled mediation or one of the parties may not appear at the scheduled mediation, thereby preventing it from taking place. Administrators of court-connected mediation program have noted that the current ADR-100 form does not provide mediators with a clear way to let the court know that a scheduled mediation did not take place. Mediators are therefore handwriting notes on the ADR-100 forms submitted to some courts. This is time consuming both for the mediators and for the courts that process these forms.

The proposed revisions to the form would add a box that mediators can use to inform the court that a mediation did not take place. Based on comments received when the proposal was circulated, the committee is also recommending that the form be revised to provide mediators with spaces where they can indicate that a party who was ordered to attend the mediation did not appear or, without violating confidentiality requirements, describe any other reason that the mediation did not take place.

While the committee believes that information about why a mediation did not take place will assist the court, the committee also recognizes that the release of information must be within the bounds of the law on mediation confidentiality. The Evidence Code makes virtually anything said or done within the context of a mediation confidential³ and prohibits mediators from providing a court with any

³ Evidence Code section 1119 provides:

Except as otherwise provided in this chapter:

(a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action,

report concerning a mediation conducted by the mediator, other than a report that is mandated by court rule or other law and that states only whether an agreement was reached.⁴ In *Foxgate Homeowners' Assn. Inc. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 13-14, the California Supreme Court examined these statutes and held:

The statutes are clear. Section 1119 prohibits any person, mediator and participants alike, from revealing any written or oral communication made during mediation. Section 1121 also prohibits the mediator, but not a party, from advising the court about *conduct* during mediation that might warrant sanctions. It also prohibits the court from considering a report that includes information not expressly permitted to be included in a mediator's report.

The statute and the Supreme Court's decision, however, are focused on communication "in the course of, or pursuant to, a mediation" and conduct "during mediation." They do not address conduct outside of a mediation or mediation consultation. If a mediation does not take place, there is no mediation to clothe the communication or conduct in confidentiality. A party's failure to appear that results in the mediation not taking place is not conduct "during mediation." It is the committee's belief, therefore, that a mediator is not prohibited from reporting to a court that a party ordered to appear at the mediation failed to do so. Similarly, a mediator may also be able to provide the court with other information about why the mediation did not take place without violating mediation confidentiality. To ensure that mediators reveal only information not covered by confidentiality requirements, the committee is recommending that the form specifically state that any information about why a mediation did not take place be provided without revealing any confidential information.

or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

- (b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.
- (c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

⁴ Evidence Code section 1121 further provides:

Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that is mandated by court rule or other law and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise in writing, or orally in accordance with Section 1118.

In opposition to this recommendation, it was argued that this cautionary statement is inadequate to protect against mediators sliding down a slippery slope into inadvertent breaches of confidentiality and that the form should therefore ask only if a party ordered to attend the mediation failed to appear. In addition, it was also argued that, even if it is permissible under the confidentiality law, having mediators report on parties' failure to appear places the mediators in a role that conflicts with the nature of their role in the mediation process. An essential element of mediation is that the mediator is neutral and does not have any coercive power over the parties in the mediation. Making them report on the parties attendance essentially places mediators in the role of policing or helping to enforce the court's orders, which might be viewed as antithetical to their noncoercive role.

The committee weighed these arguments in deciding to recommend that the form ask mediators for information about why a mediation did not take place.

Mediations that are not completed

In an effort to ensure that referrals to mediation do not inordinately delay the litigation process, the Superior Courts of both San Diego and Los Angeles Counties set deadlines by which mediation is supposed to be completed. These courts ask the mediator to send in an ADR-100 form shortly after the mediation completion date. In some cases, a mediation may not have concluded as of the date the mediator is supposed to return the completed ADR-100 form. However, the current ADR-100 form only includes options for the mediator to indicate what happened at the conclusion of the mediation. Again, mediators are having to handwrite notes on the form to indicate that a mediation has not been completed. In addition, program administrators have noted that sometimes a mediator will file an ADR-100 form by the required reporting date indicating that the case ended in nonagreement, and then the parties will engage in additional mediation sessions that ultimately result in resolving the case. If the mediator then files a new ADR-100, it may create confusion about why there are multiple forms and what was the true outcome of the mediation.

To address these concerns, the committee is recommending that the form be revised to provide mediators with places where they can indicate that a mediation has not concluded and whether this is the first or a supplemental ADR-100 form filed in the case.

Mediations that conclude in partial agreement

As noted above, form ADR-100 currently asks mediators to indicate whether a mediation ended in full agreement regarding only some of the parties. In response to comments received, the committee is recommending that the form be revised to ask generally whether a partial agreement was reached, either in the form of full agreement regarding some parties or in some other form. In recognition of the

confidentiality of mediation settlement agreements,⁵ however, the committee is not recommending that the form include any question about the substance of the parties' agreement. Some committee members argued against asking for information about partial agreements on the basis that the information would not be useful to the court without additional information about the substance of the settlement and, further, that such a question might invite mediators to reveal confidential information. However, the majority of the committee concluded that knowing whether the mediation ended in partial agreement would be helpful for the court.

Other revisions

The committee is also recommending the form be revised to: (1) include a notice box indicating the programs in which the form must be used; and (2) to make the format more consistent with other current forms.

Alternative Actions Considered

As discussed above, the committee considered not including requests either for reasons that a mediation did not take place or whether a mediation ended in partial agreement.

Comments From Interested Parties

The form was circulated during the Spring 2002 cycle. A total of 17 responses were received. Nine commentators supported the proposal without comment, six indicated they would support the proposal with modifications, and two opposed the proposal. A chart listing the comments is attached at pages 9–15.

The two commentators who opposed the revisions to the form, Judge Bendix and Ms. Julie Bronson of the Superior Court of Los Angeles County, wanted the form to ask for the reasons that a mediation did not take place and to include a note about the form's return within the timeframe required by the court. As discussed above, the committee is recommending revisions in response to both of these comments. Also as discussed above, in response to comments from Ms. Strickland of the Superior Court of Santa Clara County, the committee is recommending revising the form to ask whether there was a partial settlement. The committee is not recommending that that form include a request for information about the substance of a settlement, as suggested by Ms. Camacho of the Superior Court of Ventura County or Mr. Haeussler, because the committee believes such a request may violate confidentiality.

⁵ Evidence Code sections 1123 and 1124 make written and oral settlement agreements reached in, the course of a mediation confidential absent an agreement or another manifestation of the parties' intent that their mediation settlement agreement not be confidential.

Implementation Requirements and Costs

Superior courts that operate either Early Mediation Pilot Programs or the Civil Action Mediation Program will need to inform the mediators on their panels about the new form. Costs to the superior courts should otherwise be minimal.

Attachments

- Date:

(SIGNATURE OF MEDIATOR)

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CASE NAME: 	CASE NUMBER:
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PROOF OF SERVICE

☐ **Mail** ☐ **Personal Service**

1. At the time of service I was at least 18 years of age and **not a party to this legal action**.

2. My residence or business address is (*specify*):

3. I mailed or personally delivered a copy of the *Statement of Agreement or Nonagreement* as follows (*complete either a or b*):
 - a. ☐ **Mail.** I am a resident of or employed in the county where the mailing occurred.
 - (1) I enclosed a copy in an envelope **and**
 - (a) ☐ **deposited** the sealed envelope with the United States Postal Service, with the postage fully prepaid.
 - (b) ☐ **placed** the envelope for collection and mailing on the date and at the place shown in items below, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.
 - (2) The envelope was addressed and mailed as follows:
 - (a) Name of person served:
 - (b) Address on envelope:

 - (c) Date of mailing:
 - (d) Place of mailing (*city and state*):
 - b. ☐ **Personal delivery.** I personally delivered a copy as follows:
 - (1) Name of person served:
 - (2) Address where delivered:

 - (3) Date delivered:
 - (4) Time delivered:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

<hr style="border: 0; border-top: 1px solid black; margin-bottom: 5px;"/> (TYPE OR PRINT NAME)		<hr style="border: 0; border-top: 1px solid black; margin-bottom: 5px;"/> (SIGNATURE OF DECLARANT)
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Comments for SPR02-08
Statement of Agreement or Nonagreement

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
1.	Hon. Ronald L. Bauer Chair Rules and Forms Committee Superior Court of Orange County	AM	Y	A separate proof of service is required for each party served.	As circulated, this form includes the current standard form proof of service.
2.	Hon. Helen I. Bendix Superior Court of Los Angeles County	N	N	<p>Ideally, numbered Paragraph 3 of the proposed form would include a check-off box indicating the following:</p> <ul style="list-style-type: none"> • Failure to appear of a party or other representative required by local rule to be at the mediation; and • Failure to provide the notice of settlement or continuance required by local rule. <p>We believe that the <u>Foxgate</u> decision, however, would preclude a mediator from disclosing such conduct to the court. The <u>Foxgate</u> case has lead to uncertainty as to enforcement of local rules governing mediation. It has also lead to many complaints from the court's pro bono mediators describing how attorneys now flagrantly violate local rules governing mediation based on the belief that there will be no consequence. Some mediators have resigned from the court panel because of the increased lack of respect they perceive for their service after <u>Foxgate</u>.</p> <p>This problem has led the LASC's ADR Committee to request that the Presiding Judge ask the AOC for a legal opinion on the following issue:</p> <p>Does <u>Foxgate</u> prohibit a mediator from disclosing to</p>	<p>The committee revised the form to add two new lines under the current line 3.a. (the mediation did not take place) as follows:</p> <p>“ ____ A party who was ordered to appear did not appear”</p> <p>“ ____ Other reason (please specify without disclosing any confidential information) _____ ”</p>

Comments for SPR02-08
Statement of Agreement or Nonagreement

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				<p>the court that a party or other person required by local rule to attend the mediation failed to appear, or failed to give the notice of continuance or settlement required by local rule?</p> <p>If the above effort is not successful, we are considering requesting that the relevant provisions of the Evidence Code be amended to permit mediators to file reports disclosing the kind of violation of local rule described above.</p>	
3.	Lee Jay Berman AAA, The Mediation Alliance and The Institute for Mediation Studies	A	N	<p>A very nice job of improving an existing form. The only thing I could find was that in Santa Barbara, when I served as director of that program, we wanted two additional changes to the ones already incorporated: (1) A space in the caption (or just below it) for the judge's name or the department number (we supplied the mediators with that info. at the time of assignment and having it on the ADR-100 helped us track a case more easily), and (2) Allow for fax service (and provide a checkbox and relevant information on the proof of service), since the form is not critical to the outcome of a case, and often expedites a party's receipt of it.</p>	<p>The committee is not recommending revising the caption on this form at this time. This form uses the current standard caption used on all Judicial Council forms. The committee will be considering whether to modify this standard format to include information about the department. The subcommittee believes it would be better to wait for the development of a standardized approach to this issue.</p> <p>The committee is also not recommending revising the proof of service on this form at this time. The committee will be considering development of a standardized proof of service form that includes the fax filing information. The committee believes it would be better to wait for the development of a uniform form.</p>
4.	Julie Bronson	N	N	I have attached the proposed ADR-100 form (Draft 3)	The committee revised the form to: (1) add

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	Administrator Los Angeles County Superior Court			<p>– the Statement of Agreement or Nonagreement. The proposed changes have incorporated LASC – ADR Committee requests and include:</p> <ul style="list-style-type: none"> • Mediators email address and fax number • The ability to provide a supplemental statement • The ability to state the mediation did not take place <p>I would suggest that NOTE box state: NOTE: Within 10 days of the conclusion of the <i>mediation completion date ordered by Court</i>, the mediator must serve a copy of this statement on all parties and file the original, with proof of service, with the court clerk. The proof of service on the back of this form may be used.</p>	a place where the mediator can indicate that the mediation has not concluded but that the mediator is submitting the form in compliance with a local requirement for submission of the form by a specified deadline; and (2) modify the note at the bottom of the form to provide that the form must be submitted “within 10 days of the conclusion of mediation or, where applicable, by the deadline set by the court.”
5.	Julie Camacho Superior Court of Ventura County	AM	N	It would be helpful to the court if the form contained additional information on settlements. Specifically, I recommend that a check box be added to indicate if the settlement is (1) a conditional settlement or (2) an unconditional settlement, and if unconditional there should be a space for the parties to fill in the date on or before which counsel for the plaintiff will be filing a request for dismissal. The Ventura County Superior Court uses the information for mediation statistical purposes and also to set future clerk’s calendars to track the filing of the dismissal.	The committee is not recommending adding a request for information about the nature of a settlement reached in mediation, as that information may be covered by mediation confidentiality. However, the committee did revise the form to add an additional space that mediators can use to indicate if a partial resolution was reached.
6.	George Ducich Superior Court of San Diego County	AM	N	The court agrees with the proposed changes if modified to change the note box at the bottom of the form to read "Note: Within 10 days of the conclusion of mediation, but no later than 10 days after the case	The committee revised the form to: (1) add a place where the mediator can indicate that the mediation has not concluded but that the mediator is submitting the form in

Comments for SPR02-08
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				is due back to the court, the mediator must serve a copy of this statement on all parties and file the original, with proof of service, with the designated ADR clerk. The proof of service on the back of this form may be used."	compliance with a local requirement for submission of the form by a specified deadline; and (2) modify the note at the bottom of the form to provide that the form must be submitted "within 10 days of the conclusion of mediation, or, where applicable, by the deadline set by the court."
7.	Richard L. Haeussler Haeussler & Associates	AM	N	<p>I was recently appointed as the ARBITRATOR in a civil matter; however, because of certain procedural problems, the parties, (one of whom had been defaulted) stipulated to mediation at the time of the meeting.</p> <p>I believe that the court's proposed form should be modified to indicate that the "case was ordered to Mediation on:" or "the Parties stipulated to Mediation on:" in para 2</p> <p>Mediation agreements, done at the time of hearing, should be attached. (I had the parties sign an agreement at the time of hearing, and am filing it with the court with the Statement).</p> <p>As I was filling out the current ADR-100 in the Legal Solutions Plus Program, I noted that the Proof of Service on the current form provided for space to serve up to eight persons by mail, and did not provide for personal delivery.</p>	<p>The committee changed "I was assigned to this matter on (date)" to "I was selected as the mediator in this matter on (date)."</p> <p>The committee is not recommending requiring a copy of a settlement reached in mediation, as that information may be covered by mediation confidentiality.</p> <p>The committee is not recommending revising the proof of service on this form at this time. This form uses the current standard form proof of service. The committee will be considering development of a standardized proof of service form. The committee believes it would be better to wait for the development of a uniform</p>

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				I would suggest that your current form either allow for the attachment of a mailing list, or retain the ability to serve more than one individual as the current Draft – 3ADR 100 does.	form.
8.	Stephanie Harbin Supervising Legal Clerk Superior Court of Stanislaus County	A	N	No comment.	No response necessary.
9.	Laurel Kaufer Mediator Kaufer Mediation Services	AM	N	<p>Thank you for asking for our opinions on this one. It's a long time coming. In terms of page one, I appreciate your adding a way for us to indicate that a mediation did not take place, but it's more complicated than that. We need a way to indicate who appeared and/or who didn't. This doesn't fall into the confidentiality privilege, and is important information for the court.</p> <p>You recognize that these aren't often the only ADR-100 filed in a case. You should add a place for us to indicate that the mediation will continue and the date on which it is scheduled to continue. This will be very helpful information to the court because they use these forms to track the progress of the matter and will often set further proceedings based on the indication the case did not resolve, although they are unaware that the proceedings may be unnecessary.</p> <p>As for the proof of service form, as a personal preference, I'd like to keep the old form because I can easily cut and paste the addresses of recipients from my word processing program. Changing the form will create more work for those filling them out.</p>	<p>The committee has amended the form to add two new lines to the form under the current line 3.a. (the mediation did not take place) as follows:</p> <p>“ ____ A party who was ordered to appear did not appear.”</p> <p>“ ____ Other reason (please specify without disclosing any confidential information)_____ ”</p> <p>This is the current standard form proof of service.</p>

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10.	Sandra Mason Director of Civil Operations	A	N	No comment.	No response necessary.
11.	Andrea Nelson Superior Court of Butte County	A	N	No comment.	No response necessary.
12.	Lenor R. Noll Deputy Court Executive Officer Superior Court of Monterey County	A	N	No comment.	No response necessary.
13.	Chris Profio Director, CADRe Program Superior Court of Santa Barbara County	AM	N	The ADR-100 form should be modified, but adding a box that only says the mediation did not take place only begs the question as to why it didn't take place, and perhaps the new form could address this. In this program we've seen several cases settled prior to the scheduled mediation, mediations cancelled for a variety of reasons, cases dismissed prior to the mediation, and mediators assigned and contacted but the mediations never actually set. All of these situations suggest different levels of involvement in the case by the mediator, thus involve different record-keeping categories by the program.	The committee has amended the form to add two new lines to the form under the current line 3.a. (the mediation did not take place) as follows: "____ A party who was ordered to appear did not appear." "____ Other reason (please specify without disclosing any confidential information)____"
14.	Hon. Harry R. Sheppard Superior Court of Alameda County	A	N	No comment.	No response necessary.
15.	Elena Simonian Court Administrator Superior Court of San Francisco County	A	N	No comment.	No response necessary.

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16.	Ms. Elizabeth Strickland Superior Court of Santa Clara County	A	N	A “partial agreement” box (4d?) might be helpful as well, to advise the Court that some progress was made toward settlement. It would also advise the court that the scope of issues for trial may be narrowed, and time for trial potentially reduced.	The committee added an additional space to the form that mediators can use to indicate if a partial resolution was reached.
17.	Unknown Superior Court of Ventura County	A	N	No comment.	No response necessary.